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No. 86-723

Supreme Court, U.S.  
**FILED**

**DEC 15 1986**

JOSEPH F. SPANIOL, JR.  
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**In The  
Supreme Court of the United States**  
**October Term, 1986**

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**BEA COHEN,**

*Petitioner,*

**vs.**

**WORKERS' COMPENSATION APPEALS BOARD OF  
THE STATE OF CALIFORNIA; CALIFORNIA EX-  
TERMINATORS; ROYAL INSURANCE COMPANY;  
EL DORADO INSURANCE COMPANY; INDUSTRIAL  
INDEMNITY; FIREMAN'S FUND INSURANCE; AND  
FREMONT INDEMNITY COMPANY,**

*Respondents.*

— o —  
**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF CALIFORNIA  
FOURTH APPELLATE DISTRICT**  
— o —

**LAW OFFICES OF IBOLD & ANDERSON  
MARLA L. KELLY  
3130 Wilshire Blvd., #501  
Los Angeles, CA 90010  
(213) 380-7330**

*Counsel for Respondent*  
**ROYAL INSURANCE COMPANY**

**December 10, 1986**



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# **ANSWER TO PETITION FOR WRIT OF CERTIORARI**

## **I**

### **INTRODUCTION**

Petitioner Bea Cohen has sought a hearing on the basis that the instant case presents important issues requiring settlement by this court. The only issue presented is whether *California Labor Code Section 5406* can be construed so as to allow Petitioner to circumvent the statute of limitations. (All Labor Code citations hereinafter are to the California Labor Code.) Petitioner contends that application of the statute of limitations set forth in *Labor Code Section 5406*, barring her claim for death benefits before such claim accrued, constitutes a denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

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## **II**

### **FACTUAL BACKGROUND**

The facts are not in dispute in this case. Petitioner's deceased husband, Ben Cohen, was employed as a pest control operator during the period from May, 1962 to September 16, 1978 by California Exterminators. Ben Cohen filed a workers' compensation claim with the California Workers' Compensation Appeals Board, case number 77 LA 418809, alleging injury from exposure to toxic substances. After trial before the Workers' Compensation Appeals Board it was found that Ben Cohen's cirrhosis of the liver arose out of and occurred in the course

of his employment by California Exterminators. The date of injury was found to have been September 16, 1978, which was the last date of exposure to the allegedly toxic substances which caused or contributed to his disease. The Workers' Compensation Appeals Board Findings and Award dated January 9, 1981 awarded Ben Cohen permanent disability benefits based upon his industrial injury.

Ben Cohen died on June 4, 1983, approximately 247 weeks after the date of injury fixed by the Court. Ben Cohen's widow, Bea Cohen (hereinafter referred to as Petitioner), filed an Application for Adjudication of Claim for death benefits on June 10, 1983. Respondents filed a Request for Dismissal as to the Application for Death Benefits on August 4, 1983 on the grounds that more than 240 weeks had passed from the date of injury to the date of death and that therefore the claim was barred pursuant to *Labor Code Section 5406*.

On March 19, 1985 the Workers' Compensation Appeals Board Judge issued an Order providing that Respondents' Petition to Dismiss the Application for Death Benefits was denied. On April 8, 1985 Respondents timely filed a Petition for Reconsideration of the Opinion and Decision.

On May 17, 1985, the Workers' Compensation Appeals Board issued an Opinion and Order Granting Reconsideration and Decision After Reconsideration regarding the March 19, 1985 Opinion on Decision. The Board found that the Workers' Compensation Judge should have considered the decision of the California Court of Appeal in *Berkebile vs. WCAB*, 144 Cal. App. 3d 940, 193 Cal.

Rptr. 12 (1983) and should then have determined whether the date of injury for the death claim was later than the date of injury for the original claim, and, if so, whether the death claim was timely.

On October 24, 1985, Petitioner filed a Stipulation wherein the Petitioner stipulated that she first had knowledge of the industrial nature of Ben Cohen's injury more than 240 weeks prior to the date of his death.

On January 10, 1986 the Workers' Compensation Judge issued an Order stating that Petitioner's application for death benefits was not timely, that Respondent's Petition to Dismiss the application of Bea Cohen for death benefits resulting from the death of Ben Cohen was granted pursuant to *Labor Code Section 5406* and that Petitioner's Application was therefore dismissed.

On March 25, 1986 the Workers' Compensation Appeals Board denied Petitioner's Petition for Reconsideration of the January 10, 1986 dismissal order. Petitioner then filed a Writ of Review with the Court of Appeal on May 7, 1986. The California Court of Appeal, Fourth Appellate District, Division Three, filed an Order on May 12, 1986 denying Petitioner's Petition for Writ of Review. On May 22, 1986 Petitioner filed a Petition for Hearing with the Supreme Court of the State of California. On July 31, 1986 the Supreme Court of the State of California denied Petitioner's Petition for Hearing.



## III

## ARGUMENT

## A

**A PARTY MAY NOT COLLECT DEATH BENEFITS IF THE DEATH OCCURRED MORE THAN 240 WEEKS FROM THE DATE OF INJURY**

Petitioner's right to recover death benefits is created by statute. *California Labor Code Section 5406* clearly provides the qualifying statute of limitations for workers' compensation death benefits. *Labor Code Section 5406* provides:

The period within which may be commenced proceedings for the collection of the benefits . . . is one year from:

- (a) the date of death where the death occurs within one year from the date of injury; or
- (b) the date of last furnishing of any benefits under Chapter 2 . . . where death occurs more than one year from the date of injury; or
- (c) the date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

*No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury.*

*California Labor Code Section 5406* (West Supp. 1985) (emphasis added).

The last sentence of *Labor Code Section 5406* is further qualified by the definition of injury found in *Labor Code Section 5412*, as follows:



The date of injury in cases of occupational disease of cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

*California Labor Code Section 5412* (West Supp. 1985)

The combination of the above-mentioned code sections establishes the rule that where a party claims death benefits more than 240 weeks from the date when he or she first knew or should have known of the industrially caused injury, that claim is barred by the statute of limitations. This rule has been consistently applied by the courts of the State of California for the past thirty years.

The leading case in this area is *Ruiz vs. Industrial Accident Commission IAC*, 45 Cal. 2d 409, 289 P.2d 229 (1955) in which a unanimous California Supreme Court rejected the same arguments Petitioner has advanced. The Court noted, referring to *Labor Code Section 5406*, "There is no ambiguity in the present wording of the section, and it neither requires nor admits of interpretation". It is clear, therefore, that claims asserted more than 240 weeks after the date of injury are barred.

In *Ruiz* (supra), decedent worker contracted silicosis, a progressive disease similar to the cirrhosis suffered by Ben Cohen. In *Ruiz*, the decedent died 253 weeks after the date of injury and the applicant's widow applied for death benefits shortly thereafter, as did Petitioner in the instant case. The applicant in the *Ruiz* case advanced precisely the same argument which applicant herein urges, that the 240-week limitation period caused a claim to be barred before it ever arose. The court, however, ruled

that where the statute is written in plain language and the intent of the legislature is clear, the statute does not admit of interpretation. *Ruiz* (supra), at 414. The 240-week limitation was held by the *Ruiz* court to be more than a normal statute of limitations, more on the order of a "qualifying condition" for death benefits. *Ruiz* (supra), at 414.

In *Arndt vs. WCAB*, 56 Cal. App. 3d 139, 128 Cal. Rptr. 250 (1976), a case cited by Petitioner, a widow filed for death benefits more than 240 weeks after her husband was exposed to toxic asbestos substances. The court in *Arndt* held that her claim was not necessarily barred by the statute of limitations pending a factual determination as to the exact "date of injury"; that is, when she knew or should have known of the industrially caused injury. In the instant case, Petitioner has stipulated that she first had knowledge of the industrial nature of the injury more than 240 weeks prior to the date of her husband's death.

The statute of limitations of *Labor Code Section 5406* begins running at the time the petitioner knew or should have known of the industrial injury. The court in *Arndt* acknowledged the rule of *Ruiz* and stated:

"There (*Ruiz*) the court found mandatory the requirement of Labor Code Section 5406 that no proceeding for a death benefit may be commenced more than . . . 240 weeks after the 'date of injury'. But the court had before it no contention, or issue, or evidence, that the industrial causation of the worker's death was not known, or in the exercise of reasonable diligence would not have been known, to the Petitioner within those statutory periods."

*Arndt*, supra, at 149, 256.

Another case cited by the Petitioner, *Berkebile vs. WCAB*, 144 Cal. App. 3d 940, 193 Cal. Rptr. 12 (1983) merely affirms the holding in *Ruiz*. The court held that *Labor Code Section 5412*, when read with *Section 5406* means that a dependent's compensation claim must be commenced within 240 weeks of the time when that person knew or should have known that the injury was of industrial causation. *Berkebile* was a case in which the applicant had filed a claim for death benefits more than 240 weeks from the date of injury of the decedent employee, but within 240 weeks of the date that the applicant knew that the death was industrially caused. The facts of the case at bar are clearly distinguishable from *Arndt* and *Berkebile*. The parties herein have stipulated that the applicant knew that the deceased had an industrially caused injury *more than* 240 weeks prior to the date of his death.

The Petitioner cites *Roblyer vs. WCAB*, 62 Cal. App. 3d 574, 133 Cal. Rptr. 246 (1976), for the proposition that the courts of California have held that a claim was not barred after the 240 weeks had passed before the claim was filed. *Roblyer* is clearly distinguishable from the case in question. In *Roblyer*, the statute of limitations was tolled while the dependent was a minor in accordance with *Labor Code Section 5408*. In the case presently before this court, there is no issue of tolling of the statute based on *Section 5408* or any other statute.

The facts in this case are clear. The Petitioner has stipulated that she knew that her husband's injury was industrially caused more than 240 weeks before his death. Under the cases and statutes cited by both Petitioner and

Respondent, the statute of limitations provision of *Labor Code Section 5406* bars the Petitioner's claim for death benefits.

The Petitioner cites *Berkebile*, supra, for the proposition that the Court must interpret the statute in a manner which would not result in a right being lost before it accrues. However, *Berkebile* states that the workers' compensation law must be liberally construed unless otherwise compelled by the statute. *Only when the construction of the statute is ambiguous is it to be liberally construed.* *Berkebile*, supra, at 943. The statute is clear and unambiguous. The Legislature has left no room for liberal construction. Petitioner therefore seeks a ruling from this court that *Labor Code Section 5406* is unconstitutional. Such a ruling would leave the California Legislature helpless to impose any time limit on the filing of claims. Legislative ability to prevent fraudulent and stale claims would be thwarted. The courts would be open to a floodgate of claims and would have to make a case by case determination of whether the applicant had exercised due diligence. Such a decision would be in direct contradiction to the California Supreme Court case of *Ruiz* and the legislature's mandate. This would also make it difficult for applicants' attorneys and defendants to rationally determine when a right to death benefits lapses. The California Legislature obviously considered the possibility that there would be occasions when the death was too remote in time to qualify for death benefits and yet determined that the goal of preventing stale and fraudulent claims was more important. Since the right to death benefits derives exclusively from statutes enacted by the Legislature, the statutory conditions attached to their accrual by the Legis-

lature cannot be ignored. See *Johnson vs. WCAB*, 2 Cal. 3d 964, 971, 88 Cal. Rptr. 202, 205 (1970).

## B

### **LABOR CODE SECTION 5406 DOES NOT INFRINGE ON ANY FUNDAMENTAL RIGHT AND IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST**

*Labor Code Section 5406* contains no invidious discrimination, does not impact on a fundamental right nor a suspect class and promotes a legitimate state interest. Therefore, the statute must be upheld.

Petitioner's argument that the statute involves discrimination against survivors of long-lingering industrially-injured decedents who did discover causation promptly must be found to be without merit. Petitioner's equal protection claim does not identify any fundamental right or any suspect class which is infringed upon by *Labor Code Section 5406*.

Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *San Antonio School District vs. Rodriguez*, 411 U.S. 1, 16 (1973); *Graham vs. Richardson*, 403 U.S. 365 (1971); *McLaughlin vs. Florida*, 379 U.S. 184 (1964); *Oyama vs. California*, 332 U.S. 633 (1948); cited at *Massachusetts Board of Retirement vs. Murgia*, 312 U.S. 307 (1975). In the absence of a fundamental right or suspect classification the statute is examined under the rational-basis standard. "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing

of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. (citation omitted). Such action by a legislature is presumed to be valid". *Massachusetts Board of Retirement*, supra, at 314.

In *Smith vs. Allen-Bradley Company*, 371 F. Supp. 698 (W.D. Va. 1974) the Court rejected federal due process and equal protection arguments regarding a statute of limitations. "Plaintiff's argument is that the application . . . [of the statute there in question] in this case bars a cause of action before it has accrued and as such prevents any hearing for redress of an alleged wrong committed by a private party. The answer to this is simply that the legislature, in its infinite wisdom may, within limits of rationality, determine what are actionable wrongs and the time limits within which lawsuits must be brought to redress such wrongs." *Smith*, supra, at 701.

Petitioner directs the Court's attention to *Weber vs. Aetna Casualty*, 406 U.S. 164 (1972) dealing with a Louisiana workers' compensation statute. In *Weber* the Court considered whether a statutory distinction in death benefits between legitimate and illegitimate children violated the right to equal protection. Noting that the statute infringed on the fundamental rights of procreation and association, and that the statute could not withstand the "strict scrutiny" test triggered by the presence of such fundamental rights, the Court invalidated the statute. The language of the Court in so holding is instructive in the instant case. The Court, citing familiar principles, recites the applicable two-pronged test: "What legitimate state interest does

the classification promote? What fundamental personal rights might the classification endanger?" *Weber*, supra, at 173. In the instant case, *Labor Code Section 5406* promotes the legitimate state interests of prompt resolution of claims, judicial finality, and an end to litigation, as well as the evidentiary consideration of the avoidance of stale claims. There is no suspect class involved here. The statute barring remote claims asserted more than 240 weeks after the date of injury does not infringe on any fundamental right. Therefore, pursuant to the principle set forth in *Weber*, supra, and the other authorities cited above, the test to be applied to *Labor Code Section 5406* is a "minimum scrutiny" test. The statute must be "rationally related to a legitimate state interest". *Weber*, supra, at 172. The right asserted by Petitioner to workers' compensation benefits was created by statute. Certainly the legislature which created that right may limit that right to instances which are not too remote in time to the date of injury. Such a limitation is "rationally related" to legitimate state interests. On that basis, the statute, as a reasonable statute of limitations, must stand.

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#### IV

### CONCLUSION

Petitioners asserts that an extension of the limitation period and a change of long-settled law is warranted in this matter due to the inequity of the statute as applied to her. The California Legislature and Courts have clearly addressed this issue. The Legislature went so far as



to more clearly rewrite the statutory bar following a liberalizing judicial interpretation in a remarkably similar case. (*Ruiz vs. Industrial Accident Commission*, supra). Petitioner's contention that this statute raises a question of constitutional dimensions is simply unfounded. Petitioner's remedy, if any, appears to be with the California Legislature.

Petitioner's claim was filed after the expiration of the clearly worded statutory jurisdictional limit, no event or condition tolled this statute and the statute is merely a reasonable limitation which is rationally related to a legitimate state interest and without any impact on any fundamental right or suspect class. Therefore, the Petition for Writ of Certiorari should be denied and the decisions of the Courts of the State of California allowed to stand.

Respectfully submitted,

IBOLD & ANDERSON

By /s/ Marla L. Kelly

Attorneys for Respondent

ROYAL INSURANCE COMPANY

